No. 01-352

IN THE

Supreme Court of the United States

KATIE ARSBERRY, *et al.*,

Petitioners,

v.

STATE OF ILLINOIS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR TELEPHONE COMPANY RESPONDENTS

CHARLES H.R. PETERS*
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, IL 60606
(312) 258-5600

Counsel for Respondent AT&T Corp.

* *Counsel of Record*

(Additional Counsel for Telephone Company Respondents listed on signature page)

170269

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

RULE 29.6 STATEMENTS

Respondent Ameritech Services, Inc. is a wholly owned subsidiary of Ameritech Corporation.

Respondent AT&T Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Consolidated Communications Public Services, Inc. is a subsidiary of Consolidated Communication, Inc. and McLEODUSA, Incorporated, and no publicly held company owns 10% or more of its stock.

Respondent Evercom Systems, Inc. as successor in interest to Invision Telecom is a subsidiary of Evercom, Inc., and no publicly held company owns 10% or more of its stock.

Respondent MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corporation), is a wholly owned, indirect subsidiary of WorldCom, Inc. WorldCom, Inc. is a publicly traded company on the NASDAQ National Market under the symbols "WCOM" and "MCIT." WorldCom, Inc. has no parent corporations. No publicly held company owns 10% or more of WorldCom, Inc.'s stock. WorldCom, Inc. owns controlling interests in Embratel Participacoes, S.A., and Digex, Incorporated, both of which issue shares to the public.

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This petition for a writ of certiorari rests on the false premise that the Seventh Circuit held below that prison and jail "inmates possess no First Amendment right to use the telephone." Pet. at 9. The Seventh Circuit did not so hold. Rather, the Seventh Circuit ruled that the telephone systems selected by Illinois correctional authorities that result in more costly calls do not impermissibly infringe on inmates' First Amendment and other constitutional rights — a decision fully consistent with other federal authority.

Petitioners attempt to create the appearance of a circuit split by focusing on one sentence in the Seventh Circuit's opinion, taken wholly out of context. There is no circuit split. The Seventh Circuit's decision in *Arsberry* comports with this Court's decisions in *Turner v. Safley*, 482 U.S. 78 (1987) and *Shaw v. Murphy*, 121 S. Ct. 1475 (2001), as well as the many federal decisions holding that restricted access prison telephone systems do not violate the constitutional rights of inmates or the people they call.

The petition asks this Court to find that the Seventh Circuit has drastically departed from settled First Amendment precedent. That is simply untrue. The Seventh Circuit held, correctly, that petitioners' First Amendment rights have not been violated. There is no compelling reason to grant the petition for a writ of certiorari, and the petition should be denied.

COUNTERSTATEMENT OF THE CASE

Respondents provide the Court with the following additional facts material to consideration of the questions presented.

The State of Illinois and Cook, DuPage, and Kane Counties administer prisons and jails within Illinois. The State and the counties have adopted regulations to facilitate the orderly operation of those facilities and to ensure the safety and security of inmates, prison and jail employees, and the public. Among other things, the State and the counties restrict the means by which inmates communicate by telephone. Record in the Seventh Circuit ("R.") 39 at 1, 3, 6-7, 19.

Inmate misuse of telephones is widespread. R. 40, Ex. 1 at 2-3 of Exec. Sum. The United States Department of Justice, Office of Inspector General reported in 1999 that inmates frequently attempt to use telephones to commit fraud, threaten witnesses, conduct criminal activity including the attempted murder of witnesses and judges, and obtain contraband while behind bars. *Id.* Inmate use of telephones to operate wide-ranging criminal enterprises has been reported by prison officials, law enforcement personnel, prosecutors, and inmates themselves. *Id.*

To avoid the potential misuse of telephones, the State and the counties restrict inmates to making collect calls using a provider approved by the correctional authorities. *See, e.g.*, R. 39 at 1, 3, 6-7, 19. Illinois Department of Corrections regulations prohibit inmates from calling "1-800" numbers, emergency numbers (*e.g.*, "911"), or directory assistance, as well as numbers belonging to parolees, ex-offenders, or numbers "restricted for legitimate penological reasons, including security and order." Ill. Admin. Code tit. 20, § 525.150. The regulations also forbid inmates from dialing long-distance carriers, arranging to have their calls forwarded, or entering onto a conference call. *Id.* Inmates' calls may be monitored. *Id.*

The State and the counties have entered into contracts with telephone companies to provide collect-calling services for inmates. The telephone companies comply with the Illinois regulations and the State's and the counties' requirements by implementing specialized, automated security features that are not found in the general public phone system. *See, e.g.*, R. 40, Ex. 3 at A000023. For example, certain inmate phone systems allow prison administrators to monitor and control calls based on the duration of the call, time of day, number of calls placed per individual, and telephone number called. *Id.* The system also provides prison administrators with the capacity to block restricted calls, monitor and record phone conversations, and generate call-detail reports. *Id.* The rates that the telephone companies charge for inmate collect calls are comparable to, and in some instances actually lower than, the rates they charge the public for automated operator-assisted collect calls from a payphone. R. 40, Ex. 2-6; R. 36 Ex. A-D.

Inmates who do not wish, or who are not able, to make collect calls have other communications options. R. 31 ¶ 68. They are free to send mail to and receive mail from almost anyone they choose, and may receive visitors. Ill. Admin. Code tit. 20, § 525.120.

Petitioners sued five telephone companies, the State of Illinois, the Director of the Illinois Department of Corrections, the Director of Central Management Services for the State of Illinois, and Cook, DuPage, and Kane Counties. Petitioners complained that they are only able to make collect calls, are unable to take advantage of various telephone calling options available to the general public and, as a result, have been forced to pay allegedly excessive rates.

The district court dismissed petitioners' complaint in its entirety, ruling that the claims were barred by the filed rate doctrine and within the primary jurisdiction of federal and state regulatory agencies. The Seventh Circuit affirmed the dismissal of petitioners' claims in their entirety, holding, *inter alia*, that the restricted access telephone systems at issue do not violate petitioners' rights under the First Amendment.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT DID NOT RULE THAT PRISONERS HAVE NO FIRST AMENDMENT RIGHT TO USE A TELEPHONE, AND DID NOT CREATE A CIRCUIT SPLIT.

A. The Seventh Circuit Did Not Pronounce A New Rule Regarding Prisoners' First Amendment Rights.

Petitioners have distorted the Seventh Circuit's holding to create the false impression that this Court must intervene to address a significant departure from First Amendment precedent. Petitioners rely on the Seventh Circuit's discussion of the First Amendment rights of inmates and people they call, in particular the court's statement that "[n]ot to allow [inmates] access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme." Pet. at 8. Contrary to petitioners' portrayal, this statement does not mean that "the court below squarely held that prisoners have no [First Amendment] rights." *Id.* at 12.

First, the Seventh Circuit's actual ruling was that costly telephone use — or, in the Seventh Circuit's language,

imposition of a "tax" on inmates' telephone use — is not actionable under the First Amendment. This ruling does not "depart[] from this Court's prior First Amendment decisions," as petitioners suggest. Pet. at 13. Indeed, the language petitioners cite is found in the middle of the panel's discussion of *Minneapolis Star*, in which this Court held that a use tax on the cost of paper and ink products violated the First Amendment because it impermissibly burdened newspapers' freedom of press. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 591 (1983).

The Seventh Circuit distinguished *Minneapolis Star*, reasoning that the special concerns present in that case concerning the political process and the Framers' desire to ensure that any differential treatment of the press were not at issue in *Arsberry*. Pet. App. at 49. Thus, the fact that inmates want to use the telephone to communicate with people outside the prison is not an "excuse for bringing the taxation and regulation of telecommunications under comprehensive judicial surveillance in the name of free speech." *Id.*

Viewed in context, the statement petitioners challenge simply reflects the panel's holding that more expensive telephone rates for inmates and people they call do not rise to the level of a First Amendment violation. Contrary to *Minneapolis Star*, there are no special circumstances here that render the tax unduly burdensome in violation of the First Amendment.

Second, the Seventh Circuit expressly acknowledged that "communications the content of which is protected by the First Amendment are often made over the phone." Pet. App.

at 48. That the telephone can be used to convey constitutionally protected communications, however, did not compel the Seventh Circuit to accept petitioners' more extreme view of "the telephone excise tax [as] an infringement of free speech." *Id.* To the contrary, the Seventh Circuit noted, "[a]ny regulation direct or indirect of communications can have an effect on the market in ideas and opinions, but that possibility in itself does not raise a constitutional issue." *Id.* (citing, *inter alia*, *Minneapolis Star*, 460 U.S. at 581-83). "Otherwise, the entire tax and regulatory operations of American government would be brought under the rule of the First Amendment." *Id.*

Third, left unmentioned in the certiorari petition is the Seventh Circuit's observation that petitioners themselves alleged that greed, not any desire to limit free speech, was the motivation behind the collect-only telephone system — thus taking the case outside the purview of *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Pet. App. at 48-49. The Seventh Circuit noted that "greed" appeared to be a curious accusation in this context, "considering that prisons are costly to build, maintain, and operate, and that the residents are not charged for their room and board." Pet. App. at 49. In this regard, the panel recognized that "[b]y what combination of taxes and user charges the state covers the expense of prisons is hardly an issue for the federal courts to resolve." *Id.* If the Seventh Circuit had actually held that prisoners and those with whom they communicate possess no First Amendment rights, then the panel would have had no reason to address the motivation underlying the challenged conduct in dismissing petitioners' First Amendment claim.

Fourth, petitioners fail to inform the Court that the telephone company respondents have never argued that

inmates have no First Amendment right to use a telephone. Respondents have always recognized that right, as limited by the principles that the Supreme Court expressed in *Turner v. Safley* and like case law. The Seventh Circuit's holding that petitioners' First Amendment rights were not violated responded to the arguments respondents advanced below.

In sum, the Seventh Circuit did not make any blanket pronouncement that prisoners have no First Amendment right to telephone access.

B. The Seventh Circuit's Holding Is Consistent With Other Circuits.

Petitioners attempt to isolate the Seventh Circuit by arguing that other circuits have held that inmates have a First Amendment right to telephone access. Pet. at 13-16. In their zeal to conjure a circuit split, petitioners overlook the holdings of the cases they cite. *Every one* of the prisoner telephone access cases petitioners present to this Court is consistent with the Seventh Circuit's holding in *Arsberry*:

- The three Ninth Circuit cases petitioners cite all affirmed dismissal of inmates' First Amendment claims because the right to telephone access is subject to rational limitations. *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996); *Strandberg v. City of Helena*, 791 F.2d 744, 747-48 (9th Cir. 1986). *See* Pet. at 14.

- In *Washington v. Reno*, 35 F.3d 1093, 1100, 1104 (6th Cir. 1994), the Sixth Circuit held that plaintiffs were unlikely to succeed on their First Amendment

claim that the prison phone system violated their rights of free expression and association. *See* Pet. at 14.

- The Eighth Amendment cases petitioners cite likewise rejected First Amendment claims. *Benzel v. Grammar*, 869 F.2d 1105, 1109 (8th Cir.), *cert. denied*, 493 U.S. 895 (1989) (rejecting First Amendment claims because internal security and rehabilitation concerns justified prison telephone policy); *McDonald v. Armontrout*, 908 F.2d 388, 392 (8th Cir. 1990) (restricting inmates to one hour per week for personal telephone calls did not violate First Amendment). *See* Pet. at 14.

- The same is true with respect to petitioners' Tenth Circuit cases. *Young-Bey v. Swanson*, 246 F.3d 684, 2001 WL 179798, *2 (10th Cir. Feb. 23, 2001) (dismissing First Amendment claims for failure to state a claim); *Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996) (no First Amendment violation because telephone restrictions were reasonably related to legitimate penological objectives). *See* Pet. at 14-15.

If any doubt remained about the Seventh Circuit's position on prisoners' rights vis a vis other circuits, the Seventh Circuit extinguished that doubt with its decision in *Israel v. Cohn*, 248 F.3d 1158, 2001 WL 300710 (7th Cir. March 27, 2001), issued approximately one week after *Arsberry*. Judge Posner, who wrote the *Arsberry* opinion, was on the *Israel* panel. In *Israel*, the Seventh Circuit affirmed dismissal of an inmate's First Amendment challenge to a telephone policy that required pre-approval of telephone

numbers inmates wished to call. *Id.* at *3. The Seventh Circuit evaluated the policy under the standard set forth in *Turner v. Safley* — the standard that petitioners claim the Seventh Circuit abandoned. *Id.* at *1. In support of their decision, the Seventh Circuit cited *Thornburgh v. Abbott*, 490 U.S. 401 (1989), *Pope v. Hightower*, 101 F.3d 1382 (11th Cir. 1996), *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994), *Benzel v. Grammar*, 869 F.2d 1105 (8th Cir. 1989), *Strandberg v. City of Helena*, 791 F.2d 744 (9th Cir. 1986), *Lopez v. Reyes*, 692 F.2d 15 (5th Cir. 1982), and *Shimer v. Washington*, 100 F.3d 506 (7th Cir. 1996) — cases that petitioners claim the Seventh Circuit ignored. *Id.* at *1-2.

Finally, the Seventh Circuit cited *Arsberry*, and the particular language in *Arsberry* that petitioners challenge, as part of its *Turner v. Safley* analysis. *Id.* at *2. The *Israel v. Cohn* decision makes clear that the Seventh Circuit stands in line with the many other courts across the country that have recognized inmates do have First Amendment rights, but those rights may be limited by correctional authorities' policies that are reasonably related to legitimate penological interests.

II. PETITIONERS DO NOT STATE A VALID FIRST AMENDMENT CLAIM.

The Court need go no further. It should deny the petition for a writ of certiorari because there are no compelling reasons to grant it: the Seventh Circuit has not entered a decision that conflicts with the decision of another United States Court of Appeals on the same important matter, and the Seventh Circuit has not decided an important federal question in a way that conflicts with the relevant decisions of this Court. Courts across the country have consistently

reached the same conclusion that the Seventh Circuit reached in this case: restricted access prison telephone systems that result in costlier telephone calls do not violate anyone's constitutional rights. There are no burning, unresolved issues that should compel the Court to grant the petition.

A. Petitioners' First Amendment And Other Constitutional Claims Fail Under *Turner v. Safley*.

In *Turner*, this Court firmly established the standard for reviewing a prison regulation: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. "Legitimate penological interests" include, for example, deterrence of crime and institutional security. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). The *Turner* standard is "not demanding" and is "less restrictive than the test ordinarily applied to the alleged infringement of fundamental constitutional rights." *Young v. Lane*, 922 F.2d 370, 375 (7th Cir. 1991). Federal courts defer even more to prison authorities when a state penal system is involved. *Turner*, 482 U.S. at 85. The *Turner* standard applies with equal force to the constitutional claims of persons outside the prison environment who are affected by prison regulations. *Thornburgh v. Abbott*, 490 U.S. 401, 411 n.9 (1989) (*Turner* standard applies to both inmates and outsiders who interact with inmates).

Courts have had no difficulty applying the *Turner* standard to prison rules related to telephone use. They have consistently held that inmates do not have a constitutional right to use prison telephones on their own terms. *See, e.g., Washington*, 35 F.3d at 1100 (quoting *Benzel*, 869 F.2d at 1108 ("A prisoner has no right to unlimited

telephone use.")). Rather, "a prisoner's right to telephone access is 'subject to rational limitations in the face of legitimate security interests of the penal institution.' " *Id.* (citation omitted). Prison administrators may decide the exact nature of telephone service to be provided to inmates, as long as any restrictions are reasonably related to legitimate penological interests. *Washington*, 35 F.3d at 1100; *see also Turner*, 482 U.S. at 89.

Courts repeatedly have determined that prisons restrict inmates' telephone access for security reasons and to prevent telephone fraud. *Washington*, 35 F.3d at 1100; *Pope*, 101 F.3d at 1385; *Benzel*, 869 F.2d at 1108-09; *Arney v. Simmons*, 26 F. Supp. 2d 1288, 1293-94 (D. Kan. 1998) ("In many court opinions, it appears to be assumed that a legitimate penological purpose is served by restrictions on telephone access. . . . In this court's opinion such a common sense assumption is warranted."). They repeatedly have held that these restrictions help ensure that inmates do not harass outsiders, including victims and witnesses, or conduct illegal activity by telephone. *Carter*, 924 F. Supp. at 910; *see also Clark v. Plummer*, 1995 WL 317015, *1 (N.D. Cal. May 18, 1995). Collect-only inmate telephone systems, in particular, have repeatedly survived constitutional challenges.[1]

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1. *Johnson*, 207 F.3d at 650; *Daleure v. Kentucky*, 119 F. Supp. 2d 683 (W.D. Ky. 2000), *app. dismissed on other grounds*, 2001 WL 1230558 (6th Cir. Oct. 17, 2001) (court of appeals lacked jurisdiction because district court failed to explain determination to enter judgment on fewer than all claims under Fed. R. Civ. P. 54(b)); *Brock v. Bishop Robinson*, No. S-99-3129 (D. Md. Oct. 25, 1999), *aff'd sub nom Lloyd v. Robinson*, 217 F.3d 839 (4th Cir. 2000); *Keeby v. Indiana*, No. 3:99-CV-0277 (N.D. Ind. June 17, 1999); *Joost v. Cornell Corrections, Inc.*, 1998 WL 939531 (D.R.I. Dec. 11, 1998); (Cont'd)

Because other courts have repeatedly recognized that restricted access telephone systems advance a prison's interest in security, there appears to be little need for the Court's guidance.[2]

B. The Restricted Access Telephone Systems Are Content-Neutral And Have No Impact On Other Means Of Communication.

This Court also already has made clear that inmates' First Amendment rights are not as extensive as non-inmates' rights: "[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of . . . convicted prisoners. . . ." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979).

Where a plaintiff alleges that a prison restriction violates the First Amendment, this Court has instructed courts to consider, in particular, whether the restriction is content-neutral, and whether there are alternative means of expression

(Cont'd)
Arney, 26 F. Supp. 2d at 1288; *Carter*, 924 F. Supp. at 903; *Demits v. Tuso*, 1996 WL 33972 (N.D. Cal. Jan. 17, 1996); *Clark*, 1995 WL 317015; *Levingston v. Plummer*, 1995 WL 23945 (N.D. Cal. Jan. 9, 1995); *Loden v. Peters*, 1995 WL 89951 (N.D. Ill. March 1, 1995); *McNeil v. Springborn*, 1994 WL 48611 (N.D. Ill. Feb. 16, 1994); *Adams v. McGee*, 1994 WL 544381 (D. Or. Sept. 26, 1994); *Allen v. Josephine County*, 1993 WL 11948 (D. Or. Jan. 13, 1993), *aff'd*, 15 F.3d 1082 (9th Cir. 1994); *Lane v. Hutcheson*, 794 F. Supp. 877 (E.D. Mo. 1992); *Wooden v. Norris*, 637 F. Supp. 543 (M.D. Tenn. 1986).

2. No evidentiary hearing was necessary to decide petitioners' First Amendment claims under *Turner v. Safley*. *Spies v. Voinovich*, 173 F.3d 398, 403-04 (6th Cir. 1999).

available. *Bell*, 441 U.S. at 551; *Pell v. Procunier*, 417 U.S. 817, 823-24 (1974) (prison-visitation restrictions do not violate First Amendment where other means of communication, such as mail, remain available). The fact that the prison's chosen communication system may be more expensive or less convenient than other methods "does not fundamentally implicate free speech values." *Jones*, 433 U.S. at 130-31.

Courts have had no difficulty applying this Court's standards to the restricted access prison telephone systems challenged here. The collect-only systems do not restrict speech or association based on the substance of their communications: the systems are content-neutral. *Arney*, 26 F. Supp. 2d at 1293. Moreover, telephone calls are not petitioners' only means of exercising their First Amendment rights. Inmates may send mail to and receive mail from almost anyone they choose. Inmates also may receive visitors, including clergymen and attorneys, during regular or extended visiting hours. The availability of these alternatives undermines petitioners' First Amendment claims. *Pope*, 101 F.3d at 1385 (telephone restrictions do not violate inmate's First Amendment rights because "he could receive visitors and correspond with virtually anyone he wished"); *Benzel*, 869 F.2d at 1109 (no First Amendment violation where telephone policy only limited inmates' right to communication by telephone, not their mail or visiting privileges); *Wooden*, 637 F. Supp. at 555 (collect-only system did not violate First Amendment rights of inmates or their families where visitation and mail privileges were unaffected).[3]

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3. *See also Pell*, 417 U.S. at 828 n.5 (the fact that inmates may be inarticulate or illiterate does not foreclose mail as a legitimate

(Cont'd)

With remarkable consistency, courts have determined that restricted access prison telephone systems are content-neutral and are rationally related to legitimate penological interests. Moreover, they have determined that such systems are merely one of several means by which inmates may communicate with their families. There appears to be no genuine debate among lower courts that the systems do not violate petitioners' First Amendment rights. There simply is no issue presented that justifies granting the petition.

(Cont'd)
alternative means of communicating from prison, because an illiterate inmate may ask others to help him write a letter to someone outside the prison); *Arney*, 26 F. Supp. 2d at 1294 (plaintiffs' allegations that they were unable to write to and receive letters from people outside the prison were "unconvincing" and insufficient to support First Amendment claim); *Carter*, 924 F. Supp. at 911 (plaintiffs' assertion that some inmates or outsiders are illiterate is irrelevant to constitutional inquiry).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

CHARLES H.R. PETERS*
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, IL 60606
(312) 258-5683

Counsel for Respondent
AT&T Corp.

LESLIE M. SMITH
JULIE B. RUDER
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Respondent
Ameritech Services, Inc.

ROSS B. BRICKER
DAVID C. LAYDEN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Counsel for Respondent
MCI WORLDCOM
Network Services, Inc.

* *Counsel of Record*

JAY M. VOGELSON
STUTZMAN & BROMBERG
2323 Bryan Street
Suite 2200
Dallas, TX 75201
(214) 969-4900

Counsel for Respondent
Evercom Systems, Inc. as successor in interest to Defendant Invision Telecom

GARY SENNER
SANFORD M. PASTROFF
SONNENSCHEIN NATH
& ROSENTHAL
8000 Sears Tower
Chicago, IL 60606
(312) 876-8059

Counsel for Respondent
Consolidated Communications Public Services, Inc.